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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TANYA TAYLOR, Defendant and Appellant.	E050082 (Super.Ct.No. RIF139865) **OPINION**

APPEAL from the Superior Court of Riverside County. Arjuna T. Saraydarian, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck, Christopher P. Beesley, and Scott C. Taylor Deputy Attorneys General, for Plaintiff and Respondent.

This is a second appeal in this case. In a bifurcated proceeding, a jury found defendant Tanya Taylor guilty of one count of second degree burglary (Pen. Code, § 459)[1] (count 1) and one count of possession of a check with the intent to defraud (§ 475, subd. (c)) (count 2). Defendant subsequently admitted having sustained 20 prior strike convictions within the meaning of sections 1170.12 and 667 and one prior prison term within the meaning of section 667.5. The trial court dismissed 19 of defendant's prior strikes and sentenced her to a total term of seven years in state prison. (*People v. Taylor* (July 31, 2009, E046225 [nonpub. opn.] (*Taylor I.*)

In the first appeal, the People appealed, arguing the trial court abused its discretion in granting the motion to strike 19 of the prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). (§ 1238, subd. (a)(10).) We agreed with the People, reversed the ruling, and remanded the matter to the trial court to resentence defendant.

Upon remand, after hearing argument from the parties, the trial court denied defendant's motion to dismiss any of her prior strike convictions and sentenced defendant to a total indeterminate term of 26 years to life in state prison pursuant to the three strikes law. Defendant now appeals, claiming the sentence constitutes cruel and unusual punishment in violation of the state and federal Constitutions. We reject this contention and affirm the judgment.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Present Conviction*

On October 29, 2007, defendant entered a business called "Check Cashing" and attempted to cash a check in the amount of $150,000. The check was made payable to "Tanya Taylor" (defendant) from the "Valley Queen Cheese Factory." Defendant claimed the check was for a discrimination claim against a company she had worked for about six years earlier.

Police were subsequently alerted. Riverside County Sheriff's Deputy Anthony Gannuscio responded to the call. Defendant told him that she was trying to cash the $150,000 check awarded to her for a discrimination claim.

Investigation revealed that defendant had never worked for Valley Queen Cheese Factory and that that company had never been the subject of any discrimination litigation. The check in question was fraudulent, and the company had had problems with fraudulent checks.

Defendant's criminal history, excluding her prior strike convictions, includes offenses for misdemeanor battery (§ 243, subd. (e)) in 1997, misdemeanor false

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[2] The factual and procedural background up until the resentencing hearing is taken from this court's unpublished opinion in the prior appeal, case No. E046225. (*Taylor I*, *supra*.)

impersonation (§ 529) in 1998, and misdemeanor forgery (§ 475, subd. (a)). In each of those cases, defendant was granted probation along with a jail commitment.

From November 25, 1998, to December 20, 1998, defendant participated in a series of armed robberies; gun shots were fired during seven of them. Defendant was the getaway driver for these robberies. She was on parole for about a year and a half for these robberies when she committed the current offenses.

The details of defendant's prior strike offenses are as follows:

(1) On November 25, 1998, two men entered the Hazit Market in Perris at 6:25 p. m. One man demanded the store's money and used a gun to fire two rounds during the crime, striking the cigarette display case, cash register, and ceiling. The electronic cash register, valued at $600, was damaged.

(2) On November 25, 1998, the Super Mini Mart in Perris was robbed by two men at 6:52 p.m. One man fired a gun above one of the victim's heads; about $200 was taken.

(3) On November 29, 1998, the Meadow Brook Market on State Highway 74 was robbed by two men after one man fired a gun at the back counter, striking a wall. Approximately $2,000 was stolen. Police suspected a vehicle and a third person assisted in the suspects' escape.

(4) On December 1, 1998, two men entered Mel's Liquor & Check Cashing Store in Moreno Valley. One man pointed a firearm at the victim while demanding money. The store owners had their own firearm, and one chased the robbers away after a scuffle. Three shots were fired. The suspects entered a vehicle and fled the area.

(5) On December 1, 1998, two men entered the Open Liquor & Deli Store in Lake Elsinore about 7:54 p.m. with a firearm and robbed the place. One man pointed a gun at the clerk while demanding money. Approximately $500 was stolen.

(6) On December 4, 1998, Jr.'s Market in Moreno Valley was robbed at 4:30 p.m. by two men. One held a black semiautomatic handgun, which he pointed at the victims while demanding money. Approximately $2,000 was stolen.

(7) On December 5, 1998, at 6:50 p.m., two men entered Charlie Bois Liquor Store in Moreno Valley and robbed the store of about $200. During the robbery, one man pointed a semiautomatic pistol at the victim while demanding the money.

(8) On December 5, 1998, the A & M Market on State Highway 74 was robbed by two men at 7:16 p.m. During the robbery, a gun was pointed at an employee while $2,000 in cash and checks were taken by both suspects. Shots were fired at one of the employees when he tried to follow the men.

(9) December 9, 1998, a Washington Mutual Bank in Sun City was robbed. One suspect fired a shot at the ceiling, one of them kicked an employee in her head and side, and one of them "shoved a gun against" another employee's head. When a customer tried to follow the suspects as they left the bank, a shot was fired at her. The robbers stole about $3,195 in cash and fled in a car being driven by a female.

(10) On December 20, 1998, two men entered Country Store Liquor in Moreno Valley at 7:43 p.m. One man pointed a gun at a clerk and demanded money; he fired shots when he was given only $100.

(11) On December 20, 1998, the Car Wash & Market in Perris was robbed by two men; one wielded a firearm and pointed it at the clerk and while demanding money. They stole approximately $500 in cash and $100 worth of lottery tickets.

Defendant was arrested on December 21, 1998, along with the two male suspects. She was apprehended while attempting to cash a large number of the lottery tickets stolen the previous day. During the investigation, officers discovered that defendant had used her vehicle to transport the armed robbers and was the getaway driver. Defendant shared the proceeds from the robberies with the male suspects.

On December 10, 2000, defendant was convicted of multiple serious felonies, including one count of attempted robbery (§§ 664, 211), 15 counts of robbery (§ 211), one count of assault with a firearm (§ 245, subd. (a)(2)), and three counts of assault with a semiautomatic firearm (245, subd. (b)), resulting in a sentence of 14 years in state prison.

Defendant served about six years in state prison before she was released on parole on May 12, 2006. Defendant violated parole on October 29, 2007, when she committed the instant offenses.

Even after being convicted of the current crimes, defendant continued to deny attempting to cash the check; she did not admit any culpability. She even submitted a letter to the court denying her guilt in the current offenses. On April 21, 2008, defendant filed a motion to dismiss 19 of her strike convictions, arguing that her strikes were committed at the behest of her then-boyfriend, that she had played a minimal role in

committing the priors, that she had regularly complied with her parole terms, that the priors were remote in time, that the priors arose from a single course of conduct, and that the current offenses were of a nonviolent nature. The People opposed the motion.

A hearing on defendant's motion to dismiss her prior strikes was held on May 16, 2008. Following argument from counsel, the court granted defendant's request to dismiss 19 of her prior strikes and sentenced her to the upper term of six years on the substantive offense, plus one year for the prior prison term.

The People subsequently appealed, arguing the trial court abused its discretion in granting defendant's motion to strike 19 of the prior strike convictions pursuant to *Romero, supra,* 13 Cal.4th 497. We agreed, reversed the ruling, and remanded the matter to the trial court to resentence defendant.

The resentencing hearing was held on January 8, 2010. After reviewing the supplemental *Romero* motion and hearing argument from counsel, the court declined to strike any of the 19 prior strike convictions. The court then sentenced defendant to 25 years to life on count 1; 25 years to life on count 2, stayed pursuant to section 654; and one year on the prison prior, for a total indeterminate term of 26 years to life in state prison.

II

DISCUSSION

Defendant contends that her sentence constitutes cruel and unusual punishment in violation of the state and federal Constitutions.

A. *Analysis Under the State Constitution*

Under the state constitutional standard, "'[t]o determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.]' [Citation.] . . . 'If the court concludes that the penalty imposed is "grossly disproportionate to the defendant's individual culpability" [citation], or, stated another way, that the punishment """shocks the conscience and offends fundamental notions of human dignity""" [citation], the court must invalidate the sentence as unconstitutional.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 686.)

In re Lynch (1972) 8 Cal.3d 410 indicated that a court may also "compare the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious" (*id*. at p. 426), and "compar[e] . . . the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision" (*id*. at p. 427). Subsequently, however, our high court held that if punishment is proportionate to the defendant's individual culpability ("intracase proportionality"), there is no requirement that it be proportionate to the punishments imposed in other similar cases ("intercase proportionality"). (*People* v. *Webb* (1993) 6 Cal.4th 494, 536; *People* v.

Mincey (1992) 2 Cal.4th 408, 476; *People* v. *Miller* (1990) 50 Cal.3d 954, 1010.) Accordingly, the determination of whether punishment is cruel and unusual may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Here, the outstanding characteristic of both the offense and the offender is the recidivist commission of serious or violent felonies. Defendant has manifested a persistent inability to conform her conduct to the requirements of the law. Based on such recidivism, a term of 25 years to life for each current offense "is not constitutionally proscribed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 715.)

Defendant complains that she must serve a term longer than the sentence for such offenses as rape, mayhem, or kidnapping. But "proportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.)

Defendant points out that her current offenses are not serious felonies. However, the Legislature and the electorate have chosen to make the three strikes law applicable

even when the current felony offense is neither violent nor serious. The California Constitution does not prohibit this. (E.g., *People v. Meeks* (2004) 123 Cal.App.4th 695, 709-710 [three strikes sentence for failure to register as a sex offender].)

Defendant also argues that her current offenses are "wobblers" that would not be considered crimes in other jurisdictions.[3] "[A] wobbler is a special class of crime which could be classified and punished as a felony or misdemeanor depending upon the severity of the facts surrounding its commission." (*People v. Superior Court* (*Perez*) (1995) 38 Cal.App.4th 347, 360, fn. 17.) There is no dispute that defendant's crimes of second degree burglary and possession of a check with the intent to defraud are considered to be wobblers. Defendant's convictions were appropriately treated as felonies, and she does not contend otherwise. Rather, she contends her sentence is grossly disproportionate.

When examining whether a punishment is cruel and unusual under the Eighth Amendment, if the "defendant's sentence does not give rise to an inference of gross disproportionality, we need not conduct an intrajurisdictional and interjurisdictional analysis." (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1428.) Similarly, when evaluated under the California Constitution, the intrajurisdictional analysis "is inapposite to three strikes sentencing because it is a defendant's 'recidivism in combination with [her] current crimes that places [her] under the three strikes law. Because the Legislature

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[3] We note defendant's counsel explicates in a *lengthy* analysis, about 28 pages of the opening brief, on whether the elements of defendant's current felonies would amount to crimes in 15 other states.

may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [defendant's] punishment for [her] "offense," which includes [her] recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons.' [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338.) With respect to the interjurisdictional analysis, the fact that California's three strikes law "is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.)

Defendant's reliance on *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony*) is misplaced. In that case, the Third District Court of Appeal held that the mandatory three strikes sentence of 25 years to life was so grossly disproportionate to the violation of the sex offender registration statute at issue in that case that it "shocks the conscience of the court and offends notions of human dignity" and thus constitutes cruel and unusual punishment under both the state and federal Constitutions. (*Carmony*, at p. 1073.)

In *Carmony*, the "defendant had registered his correct address as a sex offender with the police one month before his birthday, as required by law [citation], [but] failed

to 'update' his registration with the same information within five working days of his birthday as also required by law." (*Carmony, supra,* 127 Cal.App.4th at p. 1071, fn. omitted.) The defendant's information had not changed in the interim, "and in fact [his parole agent] arrested [the] defendant at the address where he was registered." (*Ibid*.) Nevertheless, the defendant was charged with the registration violation, a felony to which he pled guilty, and three prior strike convictions, which the defendant admitted, and the trial court sentenced the defendant to the mandatory three strikes term of 25 years to life in state prison. (*Id.* at p. 1072.)

Defendant here acknowledges that her current crimes were not "passive" but asserts that "'the consequences of [her] acts' (*People v. Dillon* [(1983)] 34 Cal.3d [441,] 479), in terms of injury to others, were nothing more than minor inconvenience." Her contrary view notwithstanding, defendant's current crimes bear no similarity to the crime in *Carmony*, which that court characterized as "willful failure to file a duplicate registration as a sex offender . . . ." (*Carmony, supra*, 127 Cal.App.4th at p. 1086.) Unlike the defendant in *Carmony*, defendant in this case engaged in overt criminal conduct. In contrast, the crime in *Carmony* was one of omission, or, as the Court of Appeal described it, "a passive, nonviolent, regulatory offense, which causes no harm and poses no danger to the public." (*Id*. at p. 1086.) As the *Carmony* court noted in holding the three strikes sentence in that case violated both the state and federal Constitutions, "It is a rare case that violates the prohibition against cruel and/or unusual punishment. However, there must be a bottom to that well. If the constitutional prohibition is to have

a meaningful application it must prohibit the imposition of a recidivist penalty based on an offense that is no more than a harmless technical violation of a regulatory law." (*Carmony*, at p. 1072.)

As noted below, this is not that rare case. The sentence in this case is harsh. But harsh sentencing is not prohibited under the state or federal Constitution. Defendant has 20 prior serious and violent felony convictions. Her record includes 17 convictions for robbery, one for attempted robbery, one for assault with a firearm, and three for assault with a semiautomatic firearm in 2000. She was sentenced to 14 years for those offenses, and was released on parole in May 2006. She committed her current crimes of second degree burglary and possession of a check with the intent to defraud in October 2007, resulting in her violating her parole. Her crimes are not mere regulatory violations, such as the crime at issue in *Carmony*.

In sum, a sentence of 25 years to life, for these offenses and this offender, is not cruel or unusual punishment within the meaning of the state Constitution.

B. *Analysis Under the Federal Constitution*

Defendant also contends that her sentence violates the prohibition against cruel and unusual punishment under the federal Constitution. We again disagree. The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 819-824, and cases cited.) It is not the gravity of the current offense in the abstract, or even the fact-specific gravity of the

current offense, that is determinative. Rather, it is the fact-specific nature of the current offense considered in the light of the specifics of the perpetrator's criminal history that must be considered. (*Ewing v. California* (2003) 538 U.S. 11, 29-30 [123 S.Ct. 1179, 155 L.Ed.2d 108] (plur. opn. of O'Connor, J.).)

The United States Supreme Court has twice examined, for alleged gross disproportionality, lengthy sentences for fraud-related crimes similar to those committed by defendant here. In *Rummel v. Estelle* (1980) 445 U.S. 263 [100 S.Ct. 1133, 63 L.Ed.2d 382], the high court addressed the constitutionality of a Texas recidivist statute requiring life imprisonment upon conviction of obtaining $120.75 by false pretenses. The defendant's previous offenses consisted of fraudulent use of a credit card to obtain goods and services worth $80 and passing a forged check in the amount of $28.36. (*Id*. at pp. 265-266.) The defendant argued life imprisonment was "'grossly disproportionate'" to the three felonies committed. (*Id*. at p. 265.) The court disagreed, holding the mandatory life sentence did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. (*Id*. at p. 285.)

In *Ewing v. California*, *supra*, 538 U.S. 11, the plurality opinion, signed by three justices, upheld a three-strikes sentence of 25 years to life for grand theft. The court rejected a disproportionality argument though the defendant's current crime was a "wobbler" under California law. (*Id*. at pp. 19-20.) It explained: "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one

serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Id*. at p. 25 (plur. opn. of O'Connor, J.).) With respect to the particular defendant, it noted: "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." (*Id*. at p. 29.) It concluded: "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Id*. at pp. 29-30, fn. omitted.)

Justices Scalia and Thomas, concurring in the judgment, believed that the cruel and unusual punishment clause simply does not guarantee of proportionality. (*Ewing v. California*, *supra*, 538 U.S. at pp. 31 [conc. opn. of Scalia, J.], 32 [conc. opn. of Thomas, J.].) Thus, a clear majority of the United States Supreme Court would uphold a three-strikes sentence in all but an "'exceedingly rare'" case. (*Id*. at p. 21; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-76 [123 S.Ct. 1166, 155 L.Ed.2d 144] [state court opinion upholding three-strikes sentence of 25 years to life for petty theft with a prior was not unreasonable application of previous United States Supreme Court decisions].)

This is not such a case. Even though defendant's criminal record was not as extensive as that of the defendant in *Ewing*, it did include 20 strike priors, committed during a period of 39 days, involving violence and the use of weapons, as well as a several misdemeanors.[4] Our defendant's prior offenses are far more serious than those of

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[4] Although we acknowledge that defendant was liable for the prior robberies as an aider and abettor, the record nonetheless indicates that defendant was deeply

[footnote continued on next page]

the defendants in *Ewing* and *Rummell*. Thus, her sentence was justified by the state's interest in incapacitating and deterring recidivist felons.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P.J.

We concur:

KING
J.

MILLER
J.`

[footnote continued from previous page]
involved in these criminal offenses. Despite this, defendant portrayed herself as a victim, was not remorseful, and failed to accept any responsibility for her actions.